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## DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE: B-205552.2

DATE: February 12, 1982

MATTER OF: Alderson Reporting Company, Inc.;  
Ace-Federal Reporters, Inc.

## DIGEST:

1. GAO concludes that the entirety of the awardee's bid, including the cover letter, the cover page, and the price schedule, is subject to only one reasonable interpretation: the awardee did not charge the procuring agency anything for any services covered by the invitation for bids (IFB) and the bid was responsive to the IFB's prompt-payment-discount provision. Further, the bidder did not charge the agency any fees or offer the agency any payment.
2. Agency's failure to invite the tie bidders to witness the lottery to select the awardee does not require a second lottery where the evidence conclusively demonstrates that the first lottery was honest and impartial. GAO recommends, however, that 41 C.F.R. § 1-2.407-6(b) (1980), dealing with tie bids, be strictly followed in the future to avoid raising doubts on the part of the unsuccessful bidder concerning the fairness of the lottery.
3. GAO does not review affirmative determinations of responsibility in the absence of a showing of fraud or allegations that definitive responsibility criteria in the solicitation were misapplied.
4. GAO concludes that the agency properly determined that the acceptance of a bid containing the maximum price of \$11 per page for accelerated delivery of copies to the public adequately protected the public from paying unreasonably high prices for duplicating services. The bid contemplated up to \$11 per page for faster than overnight transcription services, not mere duplication services. Further, the agency

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restricted the charge to the public to \$0.25 for regular delivery of copies and the agency reserved the right to provide copies to the public (at presumably the actual cost of duplication).

Alderson Reporting Company, Inc. (Alderson), protests the award of a contract to Ace-Federal Reporters, Inc. (Ace), under invitation for bids (IFB) No. FERC-82-B-0001 issued by the Federal Energy Regulatory Commission (Commission) for stenographic reporting services. Alderson contends that Ace is not eligible for award because Ace's bid is nonresponsive and the lottery resulting in Ace's selection for award was improper. Prior to the Commission's award to Ace, Ace protested the Commission's determination that Alderson was eligible for award but the Commission's award to Ace essentially renders Ace's protest academic.

On January 18, 1982, Alderson filed suit in the United States District Court for the District of Columbia for declaratory and injunctive relief. Alderson Reporting Company, Inc. v. Federal Energy Regulatory Commission, Civil Action No. 82-0157. The suit concerns the same material issues that are the subject of Alderson's and Ace's protests here. By order dated January 20, 1982, the court requests that we resolve all pending protests and file a report with the court on or before February 5, 1982. In an effort to be responsive to the court, we held an informal conference with the parties on January 27, 1982, received the parties' final comments on the matter on February 1, 1982, and received copies of certain depositions on February 4, 1982. We have been advised that on February 2, 1982, the court rescheduled the hearing on this matter for February 18, 1982.

After carefully considering the record before us, we find no merit in either Alderson's protest or Ace's protest. Thus, the award to Ace should not be disturbed.

#### I. Alderson's Protest

The IFB set forth the Commission's method to be used to select the low bidder by describing 31 categories of work and disclosing estimated quantities for each category. Bidders were asked to submit fixed prices for each category. The low bidder was to be determined

by extending the prices in each category and adding the base period and option period to arrive at each bidder's evaluated bid price. The IFB also requested prices per page for accelerated delivery of copies furnished to the public (or for additional copies for the Commission). The IFB provided that the price per page for regular delivery of such copies to the public or the Commission would be \$0.25. The IFB defined regular delivery as delivery within 10 days of receipt by the Commission. The IFB defined accelerated delivery as delivery in anything less than 10 days.

Ace's bid contained prices per page (for an original and three copies) for transcription, ranging from \$2 to \$6, Ace bid the cost of magnetic media at \$1.25, and Ace bid the minimum charges for transcription of attendance at \$0. The cover page of Ace's bid (Standard Form 33) provided for a discount to the Commission of 105 percent for payment within 20 days. The individual pricing contained in the matrix portion of Ace's bid schedule, however, provided that Ace was offering the Commission a discount of 100 percent on all categories of work except the minimum charge categories<sup>\*/</sup>. In the minimum charge categories, Ace offered a prompt-payment discount of 5 percent. Ace also sent the Commission a letter along with the bid explaining that its intention was that there would be no cost to the Commission for any services or supplies required by the IFB. Ace explained that the purpose of the 105-percent "prompt-payment" discount was to insure that the Commission would be entitled to a 100-percent discount according to the formula in the IFB.<sup>\*\*/</sup> Ace also explained that the discount did not represent an offer of payment from

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<sup>\*/</sup>The IFB contemplated payment of minimum charges to the contractor when a hearing was canceled or failed to produce at least 35 pages of transcript, thus making volume or quantity discounts inapplicable.

<sup>\*\*/</sup>The IFB provided that: "Discounts in excess of 5% for prompt payment shall be construed to be quantity or volume discounts. As such these quantity or volume discounts will be taken prior to the prompt payment discount being calculated. Quantity or volume discounts will be evaluated prior to evaluation of prompt payment discounts."

Ace to the Commission. Ace further explained that its pricing scheme was used to provide the basis of surcharges to parties requesting delivery faster than the Commission requested delivery.\* / Ace's bid contained a maximum price of \$1.30 for duplication services when any member of the public requests accelerated delivery of copies.

The Commission determined that Ace's bid was responsive and should be evaluated at \$0 cost to the Government and the Commission determined that Ace's maximum price of \$1.30 for the accelerated delivery of copies to the public category adequately protected the public from paying unreasonably high prices for duplicating services.

Alderson contends that Ace's bid is nonresponsive because the 105-percent prompt-payment discount violated express language in the IFB limiting discounts to 5 percent for minimum charge items. The IFB provided that:

"Discounts in excess of 5% for prompt payment shall not apply to minimum charges. Discounts offered in excess of 5% on the minimum charges shall render the bid non responsive."  
(Emphasis in original.)

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\* / Ace's cover letter explained that the "prices offered for the various deliveries will be the basis of surcharges to parties requesting expedited delivery under Provision of Copies, page 48 of the [IFB]." Page 48 of the IFB contained an example, which formed the basis for Ace's maximum price to the public when a party requested faster delivery than the commission requested. For example, Ace's bid contains prices for overnight delivery and 5-day delivery in Washington, D.C., at \$4.50 and \$2, respectively. Ace would charge the party the difference between the two rates (\$2.50) for overnight transcription services when the Commission had requested 5-day delivery, plus \$1.30 per page for duplication services, for a total of \$3.80 per page. This charge would be the maximum charge to the public under Ace's bid for expedited transcription and duplication services.

Alderson also contends that no rational basis exists for the structure of Ace's bid providing for evaluated total prices at more than \$2 million with a 105-percent discount unless Ace intended to pay bonuses to the Commission or assess fees against the Commission. Finally, Alderson contends that the matrix portion of Ace's price schedule should not be used to interpret Ace's bid because the matrix was not intended to be filled out and was not to be used in bid evaluation.

Our analysis of Alderson's contentions begins by recognizing the well-established principle that a cover letter must be considered a part of the bid for purposes of determining the bid's responsiveness. See, e.g., National Oil & Supply Company, Inc., B-198321, June 20, 1980, 80-1 CPD 437. Similarly, the matrix portion of Ace's price schedule is a material part of Ace's bid which cannot be ignored. While its submission was not contemplated by the IFB, it was not prohibited, and it must be considered a part of the bid for all purposes. See Foss Alaska Line, 57 Comp. Gen. 784 (1978); 78-2 CPD 192 (deviations in bid relating to form may be waived; GAO view adopted by court in Sea-Land Service, Inc. v. Brown, 600 F.2d 429 (3rd Cir. 1979)).

Here, the explanation in Ace's cover letter clearly reveals (1) Ace's intention not to charge the Commission anything for any services covered by the IFB and (2) the reason for the inconsistency between the cover page and Ace's pricing schedule. Thus, regarding the minimum charge items, we are persuaded that the entirety of Ace's bid leads to only one reasonable interpretation, that is, that Ace limited its prompt-payment discount for the minimum charge items to 5 percent as required by the IFB and, thus, was responsive. Further, since Ace's bid price for the minimum charge items was \$0, the ultimate charge to the Commission for these items will be \$0, with or without the application of Ace's discount.

With regard to the nonminimum charge items, we are also persuaded that Ace's cover letter and price schedule (containing the 100-percent discount) clearly convey Ace's intention to have the bid evaluated at \$0 cost to the Commission, not to charge the Commission any fees, and not to offer the Commission any payment. Thus, the Commission properly determined that Ace's bid was responsive.

Having made the determination that Ace's evaluated bid price was \$0 and having concluded that Alderson was equally eligible for award based on an evaluated bid price of \$0 (Alderson's eligibility for award will be discussed in the context of Ace's protest), the Commission decided to conduct a lottery to select the awardee, but did not invite representatives from Alderson or Ace to be present at the lottery. In the presence of three witnesses and based on predetermined rules, the contracting officer drew cards for each bidder. Ace's card was high and the contracting officer immediately made award to Ace, notwithstanding the pendency of the protests. The determination to make award immediately was based on the reported urgent needs of the Commission and the substantial savings to the Government in view of the Commission's then current costs for these services from a third firm.

Alderson states that the official memorandum describing the lottery was the third draft prepared (the first draft did not describe the ground rules and the second draft was destroyed) and was not signed by all witnesses until 10 or 11 days thereafter. Further, the depositions of the people present during the lottery reveal some inconsistent recollections of what happened and some inconsistencies between the official memorandum and their current recollections. Alderson contends that these facts cast doubt on whether the ground rules were adequately established before the lottery.

Alderson also contends that the lottery was improper because the lottery was not conducted in strict accord with 41 C.F.R. § 1-2.407-6(b) (1980), which provides that if two bidders are equally eligible for award:

"\* \* \* award shall be made by [lottery] limited to such bidders. If time permits, the bidders involved shall be given an opportunity to be present at the [lottery]. Such [lottery] shall be witnessed by at least three persons, and the contract file shall contain the names and addresses of those witnesses."

Alderson argues that time permitted the contracting officer to give Alderson and Ace an opportunity to attend the lottery; thus, the lottery was improper. Alderson relies on our decision at 44 Comp. Gen. 661 (1965), which held that although time permitted the agency to conduct the lottery in the presence of the two eligible bidders,

the agency's failure to do so did not result in a legally defective award. There, the record contained no evidence of any impropriety in the lottery or the award; thus, we reasoned that the successful bidder would be unduly prejudiced if it would be required to submit to a second lottery.

Our Office affirmed that decision on reconsideration holding that the subject regulation is mandatory only insofar as a lottery is required in the event of tie bids and the remainder of the regulation does not create a substantive right in the bidders but merely sets forth procedures for the protection of the Government.  
B-156427, June 10, 1965.

Alderson points to language in 44 Comp. Gen. 661 stating our recommendation that "the regulation as promulgated be strictly followed in the future." Alderson concludes that since the Commission did not strictly follow the regulation, the lottery should be done again.

We faced this precise situation in our decision, B-161641, October 31, 1967. There, neither tie bidder was invited to the lottery but the record showed that the lottery was fair and honestly conducted. The protester cited the language (pointed to here by Alderson) that the regulation be strictly followed in the future. There, we held that since the evidence presented demonstrated conclusively that there was in fact an honest and impartial lottery, a valid award resulted even though the tie bidders were not invited to witness the lottery.

Again, we recommend that the regulation be strictly followed in the future (by giving the tie bidders the opportunity to attend the lottery) to avoid raising doubts on the part of the unsuccessful bidder concerning the fairness of the lottery. However, the record in this matter adequately demonstrates that the Commission conducted a fair lottery resulting in the selection of Ace. The final draft of the official memorandum describing the lottery, signed by all witnesses, confirms the fairness of the lottery. While the recent depositions of the witnesses reveal some differences in their individual recollections and the final memorandum, we are not persuaded that the differences are significant enough to warrant a second



lottery. Further, as stated in the decision cited above, the mere fact that Alderson was not invited to the lottery does not justify a second lottery in view of the fairness of the first lottery and the possible prejudice to Ace. Accordingly, we find no merit in this aspect of Alderson's protest.

Alderson also objects to the contracting officer's determination (made with respect to both Alderson and Ace prior to the lottery) that Ace is capable of performing the work as required by the IFB. Alderson cites Ace's failure to furnish an acceptable transcript of a Commission hearing, which was requested by the contracting officer to assist in his responsibility determination. The Commission explains that Ace misunderstood the directions concerning what was expected and after considering other information, the contracting officer determined that Ace was responsible.

The requirement to furnish an acceptable transcript first arose after bids were evaluated. The IFB contained no such requirement. The transcripts were requested as a portion of the contracting officer's responsibility determination. Our Office does not consider the merits of protests against a contracting officer's determination that the low responsive bidder is responsible--or generally capable of performing the work as required by the IFB. See, e.g., E.C. Campbell, Inc., B-204253, February 2, 1982, 82-1 CPD; Environmental Laboratory of Fayetteville, Inc., B-205593, December 7, 1981, 81-2 CPD 445. The contracting officer's signing of the contract constitutes an affirmative determination of responsibility. Global Crane Institute, B-204555, September 18, 1981, 81-2 CPD 226. Thus, we will not consider the merits of this aspect of Alderson's protest.

In view of our conclusion on the above aspects of Alderson's protest, there is no need to consider the merits of whether the Commission had a reasonable basis to make award prior to resolution of Alderson's protest.

Accordingly, we deny Alderson's protest in part and dismiss it in part.

## II. Ace's Protest

Alderson's bid contained a maximum price per page for accelerated delivery of copies to the public of \$10



(if ordered before transcription) and \$1.10 (if ordered after transcription). Ace contends, citing our decision in National Mediation Board--Request for advance decision, R-204842, October 7, 1981, 81-2 CPD 284, that Alderson's bid is unacceptable because Alderson's maximum price for such additional copies violates the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix (1976). The Commission determined that Alderson's bid prices for such additional copies were reasonable because Alderson's prices covered transcription services in addition to duplication services, and the Commission protected the public from paying unreasonable prices for duplication services by fixing the price per page for regular delivery at \$0.25 and reserving the right to provide copies to the public.

Our resolution of Alderson's protest has rendered academic our resolution of Ace's protest; however, in an effort to provide the court with our views on both protests, we will address the merits of Ace's protest.

Section 11(a) of the FACA provides that agencies shall make available to any person, at actual cost of duplication, copies of transcripts. 5 U.S.C. Appendix (1976). We have held that the act does not require any particular procedure on the part of agencies contracting for reporting services, so long as the public is adequately protected against paying unreasonably high prices for duplicating services. See Hoover Reporting Company, Inc., B-185261, July 30, 1976, 76-2 CPD 102, and decisions cited therein.

In our decision in CSA Reporting Corporation, 59 Comp. Gen. 338 (1980), 80-1 CPD 225, we noted that the agency had adequately protected the public by permitting the public to obtain copies from the agency for \$0.10 per page. Here, the Commission has required the contractor to provide copies to the public for \$0.25 per page for regular delivery and the Commission reserved the right to provide copies to the public (at presumably the actual cost of duplication).

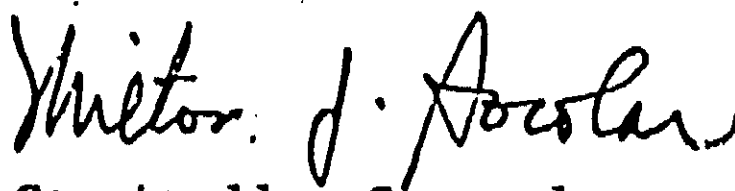
Further, Ace's price of \$1.30 for accelerated service was not the maximum price that it intended to charge the public. At the informal conference, Ace explained that when an order was placed for overnight service when the Commission requested 5-day service, the ordering party

would pay a maximum of \$3.80 per page. Alderson, on the other hand, planned to provide service faster than overnight service and Alderson wanted to be able to charge up to \$11 per page.

Here, Alderson planned to provide service to the public which was substantially different from the service contemplated by Alderson's price of \$7.50 per page for accelerated delivery (within 5 working days) of copies to the public in the National Mediation Board decision. Although, in that decision, we agreed with the Board that \$7.50 per page for copies was unreasonably high for duplication services, here Alderson contemplated transcription services (faster than overnight service) and not just duplication service. Further, the Board could not provide copies to the public in an acceptable manner but the Commission can provide copies to the public within a few days of receipt of the transcript.

In the circumstances, we find that the Commission properly determined that the acceptance of Alderson's bid would adequately protect the public from paying unreasonably high prices for duplicating services. Accordingly, we find Ace's protest to be without merit.

By letter of today, we are forwarding our views to the court for its consideration.

*for*   
Victor J. Fowler  
Comptroller General  
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON D.C. 20549

B-205552.2

February 12, 1982

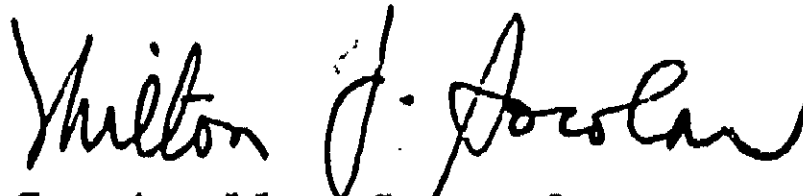
The Honorable Charles R. Richey  
United States District Court Judge  
United States District Court for  
the District of Columbia

Dear Judge Richey:

Enclosed is a copy of our decision of today in the matter of Alderson Reporting Company, Inc.; Ace-Federal Reporters, Inc., B-205552.2, which we are rendering pursuant to a court order dated January 20, 1982, relative to the pending litigation in Alderson Reporting Company, Inc. v. Federal Energy Regulatory Commission, Civil Action No. 82-0157. For the reasons explained in the decision, the Alderson Reporting Company, Inc., protest is denied in part and dismissed in part, and the Ace-Federal Reporters, Inc., protest is without merit. Thus, we recommend that the award to Ace not be disturbed.

A copy of our decision was also furnished to the parties.

Sincerely yours,

*for*   
Comptroller General  
of the United States

Enclosure